

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
September 21, 2006 Session

**STUART WATSON MCBRAYER v. ELIZABETH SMITHERMAN-  
MCBRAYER**

**Appeal from the Circuit Court for Hamilton County  
No. 00D879 L. Marie Williams, Judge**

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**No. E2006-00040-COA-R3-CV - FILED JANUARY 25, 2007**

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This is a post-divorce dispute regarding the custody of three minor children. Elizabeth Smitherman-McBrayer ("Mother"), by agreement of the parties, had been designated as the children's primary residential parent at the time of the parties' divorce. In response to a post-divorce "emergency" petition for change of custody filed by Stuart Watson McBrayer ("Father"), the trial court, Judge W. Neil Thomas, III, presiding, entered an *ex parte* order awarding Father the designation of primary residential parent. Following the subsequent recusal of Judge Thomas, Judge L. Marie Williams conducted a plenary hearing on the subject of the children's custody. The trial court undertook a comparative fitness analysis of the parties, after which it returned primary residential custody back to Mother. On appeal, Father challenges the propriety of Judge Williams' ruling. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Christine Mahn Sell, Valerie H. Richardson, and Elizabeth Dickson, Chattanooga, Tennessee, for the appellant, Stuart Watson McBrayer.

John R. Morgan, Chattanooga, Tennessee, for the appellee, Elizabeth Smitherman-McBrayer.

**OPINION**

**I.**

Mother and Father were divorced by judgment entered March 13, 2001. In the divorce judgment, the trial court approved a permanent parenting plan submitted by the parties. The plan provides that Mother is to be the primary residential parent of the parties' three sons, Culton Rogers Smitherman-McBrayer (DOB: April 14, 1994); Alexander Watson Smitherman-McBrayer (DOB:

November 6, 1996); and Conner Wilson Smitherman-McBrayer (DOB: November 3, 1997) (collectively “the children”). Under the plan, Father was to have reasonable visitation with the children, including every other weekend; two partial evenings during the weeks he did not have weekend visitation; alternating holidays; one week at Christmas; and two weeks in the summer.

On April 19, 2005, Father filed a petition for “emergency” change of primary parenting and modification of permanent parenting plan. Father sought an immediate change of custody based upon the following allegations:

During the parties’ marriage, Mother had substance abuse problems.

Mother has been hospitalized for her substance abuse.

Since the parties’ divorce, upon information and belief, Mother has continued to abuse alcohol and other chemical substances.

Upon information and belief, on or about March 25, 2005, Mother was arrested for Driving Under the Influence of alcohol.

Upon information and belief, Mother’s criminal hearing is scheduled for April 21, 2005.

Upon information and belief, Mother will lose her driver’s license for 6 months, minimum, as a result of Mother’s refusal to take an alcohol test at the time the police stopped her and subsequently arrested her.

Mother’s loss of her driver’s license will preclude her from accommodating the boys’ daily needs and emergencies.

It is imperative that the boys be in the care of Father, who does not use or abuse chemical substances and who has a valid drivers’ [sic] license, enabling him to transport the children for regular, daily needs as well as emergencies.

Mother physically disciplines all three of the boys.

Mother’s physical discipline of the three boys is inappropriate and abusive.

Mother fails to supervise the boys regarding their homework and other school responsibilities.

The boys' teachers have requested specific means for the boys to improve their emotional and academic well-being.

Father has followed every direction of the teachers to improve the boys' well-being.

Mother refuses to follow the direction of the teachers to improve the boys' well-being.

Upon information and belief, further, irreparable damage will be done to the three boys if immediate intervention and change of primary parenting to Father is not ordered.

(Paragraph numbering in original omitted).

On the day the petition was filed, April 19, 2005, Judge W. Neil Thomas, III, entered an emergency *ex parte* order designating Father as the primary residential parent of the children. A hearing on Father's petition was subsequently conducted by Judge Thomas on June 20, 2005. The evidence at this hearing focused on the fact that Mother had been charged with driving under the influence of an intoxicant as a result of a single-car accident on March 25, 2005; the possibility she might lose her driver's license for a period of time as a result of the incident; and her continued social drinking. At the conclusion of the hearing, Judge Thomas ruled that the children would remain with Father on a temporary basis pending a final hearing. On July 29, 2005, Judge Thomas entered an order recusing himself. As previously indicated, at this point in time, Judge L. Marie Williams was assigned the task of concluding this case.

On December 14 and 15, 2005, Judge Williams conducted a hearing of this custody matter. The following day, on December 16, 2005, Judge Williams filed a memorandum opinion in which she stated that the permanent parenting plan entered into by the parties at the time of their divorce would be reinstated, thereby providing that Mother would regain primary residential custody status with respect to the children. The memorandum opinion reflects the following pertinent findings:

The Court first must determine whether or not a material change in circumstances has occurred after the initial custody determination.

The person seeking to change an existing custody arrangement has the burden of proving both the child's circumstances have changed materially and that the best interest[s] of the child require a change in the existing custody arrangement. *Davis v. Davis*, 2004 Tenn.App., Lexis 664.

[Mother] contends the substance abuse allegations do not constitute a material change in circumstance as these allegations were made in

the pleadings and the issue addressed in the original divorce. The Court finds the alcohol and substance abuse allegations, even if substantiated by the proof, do not constitute a material change of circumstances. However, the Court does find there has been a material change of circumstances which was in existence at the time of the filing of the petition for modification and the entry of the emergency order. However, those circumstances have nothing to do with alcohol use or abuse. [Mother] has conceded she consumes alcoholic beverages. The evidence substantiates only intermittent use of alcohol, does not demonstrate her being under the influence of alcohol even when she was not in the presence of the children, and does not demonstrate that she has consumed alcohol in the presence of the children at any time since she has been ordered not to do so. Despite [Father] spending well in excess of \$6,800.00 on surveillance, he has been unable to document that [Mother] has been under the influence of alcohol at any time she has been in the presence of or around her children. Therefore, those allegations in no way indicate there has been harm to the best interest of the children and indicate no material change of circumstances.

There are allegations contained in the petition of physical and emotional abuse of the children. The Court has heard the admission of [Mother] that she has slapped her children on three occasions and that she regrets doing so. There has been no proof of any other physical discipline of the children and no evidence of any permanent injury to the children. The Court finds [Mother's] testimony concerning the events which instigated those events credible and while the Court certainly does not condone that type of action believes there are numerous ways to address the issue short of removing the children from the care of the Mother who it is conceded was a stay-at-home mother prior to the divorce and the primary residential parent throughout the lives of these children.

There are allegations of the Mother's inability to adequately supervise the children and there is a significant amount of evidence of the children's lack of emotional and academic stability in school beginning in the Fall of 2004 and continuing into the Winter of 2005. The only incident on which credible proof was provided regarding supervision was testimony eight 10 and 11 year old boys were on a trampoline at a birthday party while [Mother] was down the street. The Court does not find this proof sufficient to change primary residence.

The Court finds a number of circumstances coincided which resulted in the instability of the boys at that point during that period of time. First, the Father remarried and a stepmother was introduced into their lives. Secondly, the work environment and work schedule of [Mother] changed, thereby requiring her to put the boys in before-care and after-care for longer periods of time. This development, when combined with the sports activities of the boys, resulted in inadequate time for homework and rest time, a disruption of their home schedule, and in all probability a lessening of the time they spent with their Mother and an increase in the stresses on the household. Additionally, the sports activities of the boys intensified during the Fall. Each party testified he or she attempted to discuss these matters with the other. It is clear these parties have an inability to communicate with each other, that their marital relationship was adversarial, as was the divorce, and there is a great deal of resentment, each towards the other. It is most unfortunate that rather than working together and with the school to resolve what are primarily scheduling issues which could have been resolved by the dedication of time of both parents to the children's needs, an emergency petition was filed which resulted in change of custody of the children. Since the change of custody, the children have done better. Their academic and social responses have improved significantly. The evidence from the testimony of the teachers displays concern about the children and a recognition by the teachers that the parents were unable to work together and were adversarial with each other. The removal of the children from the Mother by the *ex parte* order in all respects intensified the negative chemistry between the parties. The Court finds at the time of the entry of the temporary order, there was a material change of circumstances but not one best addressed by simply changing the primary residence of the children from one household to the other. Since the time of the entry of that order, [Mother] has obtained a job at which she must work from 7:00 to 3:00 and has more control over her hours. Therefore, she is available to pick the children up from school and to do homework with them prior to their involvement in sporting events. The primary change in circumstance no longer exists.

[Father] would have this Court focus on the absence of interaction in school activities and sports activities by [Mother] since the removal of the children from her home. The Court finds her explanation of why she did not participate to the extent she did previously a rational explanation. The scheduling issue can be resolved and no longer is a material change.

The animosity between the parties and the verbal expressions of disrespect of [Mother] toward [Father] are expressly found to be inappropriate and not in the best interest of the children. The Court is confident [Mother] is capable intellectually and emotionally of adjusting her attitude towards [Father] and restricting her verbal commentary concerning him to positive attributes if she recognizes the detriment her attitude creates for her children and that this Court will not hesitate to act appropriately to protect her children if evidence demonstrates she fails to cease the derogatory comments.

The Court finds the Permanent Parenting Plan should be returned to the Permanent Parenting Plan adopted at the time of the original divorce with the exception that [Father] will be responsible for the transportation of the children to and from sporting events and practices unless the parties agree to the contrary.

It is ORDERED [Mother] will attend anger management classes and parenting classes to address her lack of restraint in her verbal expressions towards and concerning [Father] in the presence of the children and in other environments. She further is ORDERED to attend parenting classes concerning and address specifically the interaction of a single mother with preteen boys, communication skills with them, and the impact of physical discipline.

All parties are enjoined from consuming alcoholic beverages in the presence of the children or from being under the influence of alcoholic beverages in the presence of the children. The Court further ORDERS [Mother] to receive counseling on the effect of the animosity in divorce upon her children. The children shall continue in counseling so long as the counselor so recommends.

(Capitalization in original). On December 30, 2005, Judge Williams entered a final order memorializing her decree that Mother would maintain primary custody of the children.

## II.

Father appeals, raising two issues, which we quote verbatim from his brief:

1. Did the Trial Court err in changing the primary parenting of the parties' three minor sons back to Mother from Father when it failed to find that a material change of circumstances occurred after the parties' divorce?

2. Did the Trial Court err in failing to determine that the best interests of the children necessitated that father be designated their primary residential parent?

### III.

Our review of the trial court's findings of fact is *de novo* upon the record; however, those findings come to us burdened with a presumption of correctness, one that we must honor unless we determine that the evidence preponderates against the trial court's findings. Tenn. R. App. P. 13(d); **Massengale v. Massengale**, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995). We review a trial court's conclusions of law with no presumption of correctness. **Campbell v. Florida Steel Corp.**, 919 S.W.2d 26, 28-29 (Tenn. 1996).

We have addressed the significance of the trial court's role in assessing witness credibility in a custody determination:

Custody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves. Accordingly, appellate courts are reluctant to second-guess a trial court's decisions.

**Gaskill v. Gaskill**, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). *See also* **Lockmiller v. Lockmiller**, E2002-02586-COA-R3-CV, 2003 WL 23094418, at \*4 (Tenn. Ct. App. E.S., filed December 30, 2003), a case involving the custody of a child, wherein we opined as follows:

The credibility of witnesses is a matter that is peculiarly within the province of the trial court. *See* **Bowman v. Bowman**, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991). That court has a distinct advantage over us: it sees the witnesses *in person*. Unlike an appellate court—which is limited to a “cold” transcript of the evidence and exhibits—the trial court is in a position to observe the demeanor of the witnesses as they testify. This enables the trial court to make assessments regarding a witness's memory, accuracy, and, most importantly, a witness's truthfulness. The cases are legion that hold a trial court's determinations regarding witness credibility are entitled to great weight on appeal. *See, e.g.,* **Massengale v. Massengale**, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995).

(Emphasis in original). It is not the role of an appellate court to “tweak a visitation order in the hopes of achieving a more reasonable result than the trial court,” but rather, such courts should only set aside the trial court's judgment when it “falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.” **Eldridge v. Eldridge**, 42 S.W.3d 82, 88 (Tenn. 2001). While **Eldridge** dealt with visitation,

and not a decree of primary residential parent status, the thrust of the above quote would apply with equal force to the latter type of decree.

#### IV.

Father argues that, in his words, “the trial court erroneously determined that there was not a material change in circumstances since entry of the Final Decree [on] March 13, 2001.” This argument is made in support of Father’s first issue wherein he tacitly challenges the trial court’s ultimate decision to change primary parenting back to Mother “when [the trial court] failed to find that a material change of circumstances occurred *after the parties’ divorce*.” (Emphasis added). Father’s issue, and his argument stated at the beginning of this paragraph, are somewhat confusing. We believe Father is basically saying two things: first, that there was a change of circumstances *since the divorce* warranting a change in custody from Mother to Father, and, second, that there was no change in circumstances, *since Judge Thomas’ emergency order*, justifying a change in custody back to Mother. We reach this conclusion because Father, as the complaining party, obviously had the burden of showing that there had been a change in circumstances warranting a change in custody since the divorce. However, by the same token, it is clearly Father’s position that nothing occurred after Judge Thomas’ *ex parte* decision to warrant a change of custody back to Mother.

In addressing Father’s first issue, it is necessary to begin with some basic principles that apply to temporary or interim custody orders. “An interim order is one that adjudicates an issue preliminarily; while a final order fully and completely defines the parties’ rights with regard to the issue, leaving nothing else for the trial court to do.” *Hoalcraft v. Smithson*, 19 S.W.3d 822, 827 (Tenn. Ct. App. 1999). Before the entry of a final judgment, an interim order “remains within the court’s control and may be modified.” *Id.* As explained by this Court *In re E.J.M.*, No. W2003-02603-COA-R3-JV, 2005 WL 562754, at \*18 (Tenn. Ct. App. W.S., filed March 10, 2005),

[w]hen a petition for modification is filed, any temporary decree changing custody pending final resolution is just that – temporary and not entitled to the same *res judicata* protections. We note that “[t]emporary alterations of existing custody arrangements should be limited to circumstances where clear and convincing evidence shows that a child is being harmed or is about to be harmed where he or she is,” and, when a temporary change in custody is made, it should “amount to nothing more than a preliminary decision . . . until a reasonably prompt full hearing on custody can be held.”

(Citation omitted).

In this case, the *ex parte* order entered by Judge Thomas on April 19, 2005, was a temporary or interim one. It was based upon the allegations of the “emergency” petition. In other words, the order went down solely upon Father’s side of the story with no opportunity afforded to Mother to



rebut Father's assertion.<sup>1</sup> It was not until June 20, 2005, that the parties engaged in a full-blown hearing, at which time Judge Thomas decided to leave his earlier order in place pending a final hearing.

The parties participated in a plenary hearing before Judge Williams, on December 14 and 15, 2005. At that point, Judge Williams was entitled to approach this custody matter anew, without being bound by the interim decision made by Judge Thomas. In so doing, Judge Williams was required to analyze whether a material change in circumstances had occurred *since the final divorce decree, not since the entry of the ex parte order*. See **Keisling v. Keisling**, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005) ("Though temporary custody orders may be entered after the entry of the final decree, a change in circumstances is measured from the final order of custody under which the parties are currently operating."). In the memorandum opinion, Judge Williams correctly acknowledged this requirement when she stated, "[t]he Court first must determine whether or not a material change in circumstances has occurred after the initial custody determination."

Contrary to Father's assertion, it is clear that Judge Williams determined that *there had been a change in circumstances* – albeit not the "drinking problem" urged by Father – such as to warrant a new look at the issue of custody. Judge Williams expressly found that the "alcohol and substance abuse allegations, even if substantiated by the proof, do not constitute a material change of circumstances." Implicit in Judge Williams' memorandum opinion is the recognition that Judge Thomas was faced with an "emergency" petition and made a decision following an *ex parte* hearing with no involvement of Mother's side of the story. Judge Williams' view was markedly different – she heard both sides over two days and had to decide whether the change of circumstances, which she admittedly found, warranted a change in custody. Judge Williams determined that the material change in circumstances involved the day-to-day scheduling difficulties experienced by the children, who were suffering from problems associated with instability as a result of Mother's entrance into the work force, Father's remarriage, and the increase in the boys' sports activities.

In summary, we conclude that there was a change of circumstances as found by Judge Williams; that it warranted a new look at the issue of custody; and that Judge Williams was not bound by Judge Thomas' interim order.

## V.

Moving to Father's second issue, we must determine whether the evidence preponderates against Judge Williams' decision that Mother should regain custody based upon a comparative fitness analysis of the parents.

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<sup>1</sup>This is not to say that Judge Thomas' handling of the emergency petition was improper. It clearly was not. We point out the *ex parte* nature of the proceedings just to emphasize that Judge Thomas did not have the benefit of Mother's evidence when the original *ex parte* order was entered.

There are “[n]o hard and fast rules . . . for determining which custody and visitation arrangement will best serve a child’s needs.” *Gaskill*, 936 S.W.2d at 630. A custody determination is “factually driven and requires the courts to carefully weigh numerous considerations.” *Id.* The overriding consideration is the best interest of the child. *Id.* The factors a trial court is to consider when determining the custody of children are set forth in T.C.A. § 36-6-106 (2005), which provides, in pertinent part, as follows:

(a) . . . in any . . . proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. The court shall consider all relevant factors including the following where applicable:

(1) The love, affection and emotional ties existing between the parents and child;

(2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;

(3) The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment . . . ;

(4) The stability of the family unit of the parents;

(5) The mental and physical health of the parents;

(6) The home, school and community record of the child;

(7)(A) The reasonable preference of the child if twelve (12) years of age or older;

(B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person . . . ;

(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person’s interactions with the child; and

(10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

*Id.*

In this case, there is abundant evidence showing that there is "love, affection and emotional ties existing between [both] parents and [their] child[ren]." *See* T.C.A. § 36-6-106(a)(1). Moreover, there is evidence that both parents provide the children with food, clothing, and other necessary care while they are in their custody. *See* T.C.A. § 36-6-106(a)(2). The trial court found that Mother had been the children's primary caregiver throughout the lives of the children. The evidence reveals that Mother was a very active and devoted stay-at-home mother who primarily took care of the children prior to the divorce, and further that the parties agreed Mother should remain the primary residential parent following the divorce. We hold that the evidence does not preponderate against the trial court's finding that these factors favor Mother as the primary custodian. Given this conclusion, the importance of continuity in the children's lives is also favorable to Mother. *See* T.C.A. § 36-6-106(a)(3).

Father's main objections to Mother maintaining custody of the children focus on her alleged drinking problems; her alleged failure to supervise the children in school and other activities; and her alleged physical and verbal abuse of the children. The proof relating to these matters implicates to some degree the factors involving the stability of the family unit of the parents, T.C.A. § 36-6-106(a)(4); the mental and physical health of the parents, T.C.A. § 36-6-106(a)(5); the home, school and community record of the children, T.C.A. § 36-6-106(a)(6); and evidence of physical or emotional abuse to the children, T.C.A. § 36-6-106(a)(8). We will address each of these factors in turn.

With respect to Mother's drinking, the trial court found that "[t]he evidence substantiates only intermittent use of alcohol, does not demonstrate her being under the influence of alcohol even when she was not in the presence of the children, and does not demonstrate that she has consumed alcohol in the presence of the children at any time since she has been ordered not to do so." The evidence does not preponderate against the trial court's explicit finding that Mother's social drinking does not affect the children's well-being in a detrimental way. *See* T.C.A. § 36-6-106(a)(4), (5). In addition, Father was aware of Mother's drinking habits at the time of the divorce. Moreover, out of an abundance of caution, the trial court enjoined all parties from consuming or being under the influence of alcoholic beverages in the presence of the children.

Next, we will address the proof relating to Mother's supervision of the children in school activities. The evidence reveals that the children began to experience emotional and academic problems in school beginning in the fall of 2004. In fact, in December 2004, the parties received a letter from several of the boys' teachers expressing that Mother and Father must take immediate

steps to help the boys with their emotional distress and inability to focus on academic work. As noted by the trial court, these problems with the boys surfaced around the time that Mother, who had been a stay-at-home mother, entered the work force because her alimony payments ended. Mother testified that she was working long hours and, as a result, the boys had to be placed in before-care and after-care programs at school, leaving very little time for homework to be completed before their sports activities started. In addition, the trial court pointed out that these problems coincided with Father's remarriage and the introduction of a stepmother into the children's lives, as well as an increase in the boys' sports activities. As summarized by the trial court, "[Mother's work schedule], when combined with the sports activities of the boys, resulted in inadequate time for homework and rest time, a disruption of their home schedule, and in all probability a lessening of time they spent with their Mother and an increase in the stresses on the household." There is evidence that Mother's supervision of the children's school activities slipped during a difficult time when she was adjusting to full-time work as a single mother. Fortunately, Mother, in the summer of 2005, took a job with more flexible hours, allowing her to pick up the children from school without placing them in an after-care program and enabling her to spend time helping the children with their homework before their sports activities begin. The trial court found that Mother's new job resolved the scheduling issues that were at the core of the children's stability problems. The evidence does not preponderate against the finding that the home, school and community record of the children favor Mother. *See* T.C.A. § 36-6-106(a)(6).

The evidence involving Mother's alleged failure to supervise the children during other activities, particularly during a birthday party for one of her children, deserves little discussion. There was testimony involving an incident where Mother left her child's birthday party to pick up a former boyfriend, who had been drinking, from a Waffle House. Mother left the boys, who were jumping on a trampoline, in the presence of other adults. As found by the trial court, "this proof [is not] sufficient to change primary residence." While Mother may have been lacking in judgment with respect to this incident, the evidence does not preponderate against the trial court's decision that such an incident would not warrant a change of custody.

The record reflects that Mother slapped her middle child on two occasions and that she slapped her oldest child on one occasion. Mother explained the circumstances that led to her slapping her middle child – that he refused to get out of bed while she was trying to get ready for work and get the other children ready for school and he spoke to her in a very derogatory manner. She testified that she does not normally lose her temper and that she was not proud of and was very sorry for these occasions when she did. The trial court found that "[t]here has been no proof of any other physical discipline of the children and no evidence of any permanent injury to the children." The trial court further found Mother's explanation of these incidents to be credible. *See Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997) (a party's demeanor and credibility, which the trial court has the benefit of observing first hand, are subtle factors that influence custody decisions). While not condoning such discipline, the trial court found there are numerous ways to address the issue short of removing the children from Mother's custody. In fact, the trial court ordered Mother to attend parenting classes concerning "the interaction of a single mother with preteen boys, communication skills with them, and the impact of physical discipline." While we

share the trial court's view of such discipline, we conclude that the evidence does not preponderate against the trial court's decision that the factor of physical or emotional abuse should not affect Mother's custodial rights. *See* T.C.A. § 36-6-106(a)(8). As an aside, we note that there is evidence that the middle child had a particularly hard time spending residential time with Mother during the time that Father had temporary custody. However, there is nothing in the record to suggest that the relationship between Mother and this child is broken beyond repair, and we are hopeful that the counseling ordered by the trial court for both Mother and the child will help mend this unfortunate situation.

The children did not testify in this matter. Therefore, the factor with respect to the children's preference about where they want to live is not applicable. *See* T.C.A. § 36-6-106(a)(7). In addition, the factor involving the character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child is not implicated here. *See* T.C.A. § 36-6-106(a)(9).

With respect to the final factor, the parties' willingness to facilitate and encourage a close relationship between the children and the other parent, the evidence focused on Mother making disparaging comments about Father and his new wife both in front of the children and to other people. *See* T.C.A. § 36-6-106(a)(10). While the trial court acknowledged that such expressions were inappropriate and not in the children's best interest, the court stated that it

is confident [Mother] is capable intellectually and emotionally of adjusting her attitude towards [Father] and restricting her verbal commentary concerning him to positive attributes if she recognizes the detriment her attitude creates for her children and that this Court will not hesitate to act appropriately to protect her children if evidence demonstrates she fails to cease the derogatory comments.

Moreover, the trial court ordered Mother to attend anger management and parenting classes "to address her lack of restraint in her verbal expressions towards and concerning [Father] in the presence of the children and in other environments." We find that the evidence does not preponderate against the trial court's decision that this factor does not militate against Mother maintaining custody. We have no doubt that, in the face of potentially losing custody of her children, and with the assistance of appropriate counseling, Mother will heed this serious warning.

After carefully reviewing the record, we conclude that the evidence does not preponderate against the trial court's finding that the statutory factors ultimately favored Mother as the primary custodian of the children. The trial court properly conducted a comparative fitness analysis in light of the circumstances as they existed at the final hearing. We find no abuse of discretion on the part of the trial court in reinstating the permanent parenting plan such that Mother would maintain primary residential parent status.

## VI.

In the conclusion section of both parties' briefs (but not in the "issue" section of either brief as required by Tenn. R. App. P. 27(a)(4)), Mother and Father each ask to be awarded attorney's fees, expenses, and costs, including those incurred on appeal. Since this case involved the issue of custody, the trial court had statutory authority to award such fees if it determined that such an award was appropriate. *See* T.C.A. § 36-5-103(c) (2005).

In its final order, the trial court stated that each party would be responsible for their own attorney's fees and that the costs would be divided equally between the parties. We find no abuse of discretion in the trial court's judgment. Furthermore, we decline to award fees for services rendered by the attorneys on this appeal. Each side will pay its own fees and expenses.

## VII.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of its judgment and the collection of costs assessed below, all pursuant to applicable law. We tax the costs on appeal to the appellant, Stuart Watson McBrayer.

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CHARLES D. SUSANO, JR., JUDGE